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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-333

STATE OF CALIFORNIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE CITY OF KLAMATH FALLS, OREGON AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The City of Klamath Falls, Oregon is a municipal corporation that has applied to the Federal Energy Regulatory Commission (FERC or the Commission) under part I of the Federal Power Act (FPA) for a license to construct and operate a hydroelectric project, known as the Salt Caves project, on the Klamath River. Some of the fast lands included in the project are owned by the United States and some by private parties. The State of Oregon contends that the reach

of the river involved is navigable and, therefore, that the State owns the bed, but this has not been authoritatively determined.

No one questions that the project is required to be licensed by FERC under the FPA, but four agencies of the State of Oregon, not including the Environmental Quality Commission from which a certificate of compliance must be obtained under § 401 of the Clean Water Act (33 U.S.C. § 1341), assert that the project may not be constructed unless, in addition to a license from FERC and a certificate from the Oregon Environmental Quality Commission, the City also obtains various permits from each of them.

The Oregon Water Resources Commission contends that the City must obtain a permit to divert water from it and that it is authorized to impose conditions unrelated to the protection of the water rights of other persons. The Energy Facilities Siting Council asserts that the City must obtain a license from it to construct the physical facilities of the project. Based on its contention that the reach of the Klamath River within the boundaries of the project is navigable and that Oregon owns the bed, the State Land Board asserts that the City must obtain a lease or right-of-way from it. The Department of State Lands asserts that the City must obtain a permit from it before doing anything that may affect or disturb the bed.

By either declining to grant or making known that it has no intention of granting the permit it contends the City must obtain to construct the project, each of these agencies has demonstrated that the project will not be constructed if its position respecting the scope of its authority is sustained, regardless that

FERC issues a license upon concluding, after plenary consideration, that the project is the

> best adapted to a comprehensive plan for improving or developing [the] waterway . . . for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water—power development, for the adequate protection, mitigation, and enhancement of fish and wildlife . . . and for other beneficial public users, including irrigation, flood control, water supply, and recreational and other purposes . . . .

§ 10(a) FPA, as amended (16 U.S.C. § 803(a)).

SUMMARY OF ARGUMENT

California's case is rested on several false premises, among them (1) that, under the equal footing doctrine, a new state receives the same rights in jurisdictional waters of the United States as it receives in the beds and banks of navigable waterways; (2) that, by the Mining and Desert Land Acts of the last century, the United States surrendered some part of its ultimate dominion over waters of the United States subject to the control of Congress under the commerce and property provisions of the Constitution; and (3) that § 27 of the FPA is an "anti-preemption" provision.

Each of these postulates is dead wrong and their erroneousness infects the whole of California's case.

The provision of § 8 of the Reclamation Act of 1902 that requires the Secretary of the Interior, in carrying out that Act, to proceed in conformity with state water law, has no counterpart in § 27 of the FPA. This provision was determinative of *California v.*

United States and, in its absence, § 8 undoubtedly would have been construed in *California* as was § 27 in *First Iowa*. There is no tension, let alone conflict, between the two decisions.

The legislative history of the FPA was thoroughly considered in *First Iowa* and California has presented nothing to warrant its review. It is noteworthy that much of the "history" brought forth by California relates to bills that proposed only to authorize the leasing of the public lands for the development of water power. These bills did not entail, as the FPA does, an exercise of the commerce powers over all jurisdictional waters of the United States.

The Court's construction of § 27 of the FPA in *First Iowa* is not dictum. It is the heart of the case. California's contentions (1) that confirming the principle that, as to matters assigned to the Commission's jurisdiction by the FPA, the Commission's authority is exclusive of any "concurrent" state authority, will complicate the administration of water resources, and (2) that the by-pass flows the state agency attempted to mandate in this case, being greater than those set by the Commission, would not be inconsistent with the Commission's prescription, are specious.

Rarely are jurisdictional waters of the United States subject to regulation under a unitary state regime. Typically, they are subject to a complex of state, federal and, sometimes, international regulation and, in any event, the exercise by the Commission of the exclusive jurisdiction defined by the Court in *First Iowa* has caused no particular problems in the administration of the nation's waters for almost fifty years.

The feasibility of a hydroelectric project depends on the quantity of flows through its powerhouse and California's attempt in this case to require greater by-pass flows than provisionally found adequate by the Commission is clearly incompatible with the conditions of the license for the project issued by the Commission.

Fully cognizant of how § 27 of the FPA was construed in *First Iowa* and applied for almost half a century, Congress recently confirmed, in adopting the Electric Consumers Protection Act, that the Commission is to continue as the final arbiter of whether a project should be authorized and, if so, on what terms and conditions.

ARGUMENT

I. California's Argument Is Based on Fallacious Premises

California sets forth several fallacious propositions that serve as premises for its argument. Among these are (A) that the equal footing doctrine operates to transfer ownership or control of waters to new states in like manner as to transfer ownership of the beds and banks of navigable streams, Cal. Op. Br. 5-6, 18-19; (B) that the effect of the triptych of 19th Century statutes consisting of (1) § 9 of the Mining Act of 1866 (30 U.S.C. § 51), (2) § 17 of the Act of July 9, 1870 (30 U.S.C. § 52), and (3) the Desert Land Act of 1877 (43 U.S.C. §§ 321-23, 325, 327-29) was to extinguish federal powers over waters, *id.* at 20-21; and (C) that § 27 of the FPA (16 U.S.C. § 821) is an "anti-preemption" provision, *id.* at 8-12.

A.

Although it is held, under the equal footing doctrine, that the United States holds the beds of na-

vigable waters in trust for future states and that, upon admission of a new state to the Union, it receives title to such beds by operation of the doctrine, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845), (to the extent the United States has not previously disposed of such beds or reserved them for its own use, *United States v. Holt State Bank*, 270 U.S. 49, 55 (1925)), it has never been held that, simply by operation of the doctrine, a new state receives title to or power to dispose of waters of the United States, any more than it receives title to or power to dispose of the public lands of the United States.

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor to the Federal government by the Constitution.

Gibson v. United States, 166 U.S. 269, 271-72 (1897). *See also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 424 (1940) (United States has dominion over the water power in navigable streams and there can be no private ownership of such water); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1912) (private ownership of running water in a navigable stream is inconceivable).

B.

As a constitutional matter, there can be no question that, under its power "to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States" (Art. IV, § 3, cl. 2), Congress could have made radically different provisions for the disposition and use of water on the public domain than it did by the 19th Century statutes cited above. It could, for example, have attached such water to the riparian uplands and provided that rights of use would pass with the lands. *Cf. proviso* § 8 of the Reclamation Act of 1902 (43 U.S.C. § 372).

By these statutes, Congress severed the waters from the lands of the public domain and delegated to the western territories, as well as to the western states, the authority to provide for the acquisition and regulation of private rights in non-navigable waters. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 706 (1899); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 162 (1935). Congress, however, did not thereby surrender or extinguish the ultimate dominion of the United States or abrogate any of its own constitutional powers. *Rio Grande, supra.*

Retention by Congress of ultimate authority over waters of the United States is demonstrated by the reserved rights doctrine, *Arizona v. California*, 373 U.S. 546, 600 (1963); *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976), and the power of Congress to override state laws in commissioning federal projects entailing the use of water, *California v. United States*, 438 U.S. 645, 674 (1978). The only limitation on Congress is that, except in the exercise of the commerce powers, it cannot expropriate water rights vested under state law without subjecting the United States to an obligation under the fifth amendment to pay just compensation.

Again, as a constitutional matter, there can be no question that Congress would have the power, saving vested property rights, to repeal all of the 19th Century and other acts delegating authority to the states to provide for the acquisition and regulation of private water rights. Whatever might be said about the wisdom and practicality of such a repeal, it would be within the constitutional powers of Congress, in aid of legislation to formulate a national policy for the use of all water resources remaining available, to provide for the reservation to the United States of all unappropriated waters in streams subject to the jurisdiction of Congress under the commerce clause and of all waters on lands subject to the jurisdiction of Congress under the property clause.

Whatever "deference" the United States accords the states in the management of our national waters is, as the decisions of this Court have made clear, by grace of congressional policy, not by imperative of the Constitution.

C.

Section 27 of the FPA is not, as California would have it, an "anti-preemption" provision. It is, as the Court stated in *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S. 152, 175 (1946), a "saving" provision. It was included to preclude construction of the Act as wholly displacing state water law in relation to waters subject to the control of Congress under the commerce and property powers or as authorizing the expropriation without compensation of private water rights.

Adoption of the FPA (originally the Federal Waterpower Act) was an exercise by Congress of its

property and commerce powers, an adjunct of the latter of which is the dominant servitude for navigation the United States possesses in relation to the waters of the nation that are subject to the control of Congress under the commerce powers. All private water rights are subordinate to this servitude and may be extinguished by Congress incident to the exercise of its commerce powers without subjecting the United States to any obligation to compensate their former owners. Although the servitude is commonly associated with navigation, it is as broad as the commerce powers and pertains to any exercise by Congress of such powers for any purpose within them, including the development of water power. *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 426-27.

In the absence of § 27, the Act, as an exercise of the commerce and property powers, would undoubtedly have been construed as dedicating the jurisdictional waters of the United States ("streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states, or upon any part of the public lands and reservations of the United States," § 4(e), FPA, [16 U.S.C. § 797(e)]) to its purposes and as removing them entirely from the future operation of state law. And, in view of the servitude, it would have been construed as authorizing the invasion or extinguishment without compensation of any private rights in waters required by projects licensed by the Commission. Indeed, even with § 27, it was not determined until 1954 by the Court's decision in *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 293, that the Act was not intended to have this effect.

Thus, California's argument is based on the fallacious premise that § 27 is an "anti-preemption" provision. In fact, as this Court said in *First Iowa*, it is a "saving" provision. It was included not to limit the jurisdiction of the Commission but to preclude construction of the Act itself (a) as completely displacing the further application of state water law to jurisdictional waters of the United States, even where a particular exercise of the Commission's authority was not involved, or (b) as authorizing licensees of the Commission to invade private water rights without making compensation.

Contrary to California's suggestion that, unless § 27 is construed as an anti-preemption provision, the first part of the section is a nullity, Cal. Op. Br. 10, such part is essential to preserve the application of state water laws to jurisdictional waters of the United States, where such application does not conflict with the exclusive authority granted the Commission to license hydroelectric projects on such waters. In the absence of the first part of § 27, the Act would have ruled state water laws completely off jurisdictional waters of the United States.

II. There Is No Counterpart in § 27 of the FPA of the Provision of § 8 of the Reclamation Act Applying To the Secretary of the Interior That Was Determinative of *California* v. *United States*, and There Is No Tension between *California* and *First Iowa*

While it is true that the language contained in § 27 of the FPA was largely borrowed from § 8 of the Reclamation Act of 1902, § 8 contains several provisions that have no counterpart in § 27. In its entirety, § 27 consists of language similar to that

contained in the first clause of § 8. But after this clause (where § 27 ends), § 8 goes on—

> and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

43 U.S.C. §§ 372, 383.

Of critical importance is that the provision in § 8 relating to the Secretary of the Interior, which has no counterpart in § 27, was determinative of *California v. United States*, 438 U.S. 645 (1978).

> From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. *First, and of controlling importance to this case, the Secretary would have to appropriate, purchase or condemn necessary water rights in strict conformity with state law.*
>
> * * *

Second, once the waters were released from the Dam, their distribution to individual

land owners would again be controlled by state law.

* * *

Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, *but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'*

Id. 665, 667, 674-75 (emphasis supplied).

In *California* the Court confirmed that the Secretary is required to conform to state water laws only to the extent he can do so consistently with the provisions of the Act authorizing the project in question and that Congress has the power to override the provision of § 8 and the application of state water law. *Id.* 674.

Relative to a hydroelectric project licensed by FERC under the FPA, it is the licensee, not the Commission, that occupies a position analogous to that of the Secretary relative to a reclamation project authorized by Congress. Under the FPA the role of FERC in licensing hydroelectric projects is analogous to that of Congress in authorizing reclamation projects.

In delegating authority to the Commission to license hydroelectric projects on jurisdictional waters of the United States, it would have been nonsensical for Congress to have appended to § 27 any such language as "and the Commission, in carrying out the provision of this Act, shall proceed in conformity such [state

water] laws." No more does the Commission construct and operate hydroelectric projects than Congress constructs and operates reclamation projects.

Congress' purpose in enacting the Federal Water Power Act being to secure expeditious and orderly development of the power potential of the jurisdictional waters of the United States by delegating comprehensive authority to the Commission to pass upon, license, and regulate hydroelectric projects, it would have made no more sense, and would have been in conflict with what Congress was seeking to achieve, for it to have tacked on to § 27 any such language as "and licensees, in carrying out the provision of this act, shall proceed in conformity with such [state water] laws."

If such a provision were appended, it would be interpreted in like manner as the provision relative to the Secretary in § 8 of the Reclamation Act as meaning "to the extent consistent with the terms and conditions of the license issued by FERC." This, of course, is precisely how the Commission has construed and applied the Act for almost fifty years

Because of the absence from § 27 of the FPA of any provision analogous to that pertaining to the Secretary in § 8 of the Reclamation Act, upon which the decision in *California v. United States* turns, there is no tension between the decision in *First Iowa* construing § 27 and the decision in *California* construing § 8. In the absence from § 8 of the provision applying to the Secretary, it is apparent that § 8 would have been interpreted in *California* as was § 27 in *First Iowa*. In *California* the Court said:

> That section [§ 8] does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the control, appropriation, use or distribution of water.

III. None of California's Other Propositions Is Sustainable

California argues further (A) that the legislative history of the FPA indicates that Congress intended to defer to state water law; (B) that the construction of § 27 in *First Iowa* is dictum; (C) that affirming the exclusive authority of FERC to license hydroelectric projects on the jurisdictional lands and waters of the United States may result in inconsistent regulation of water rights in the same stream; and (D) that the by-pass requirement the state would impose on the project in this case does not conflict with the conditions of the license for the project issued by FERC.

A.

In aid of the proposition that the authors of the FPA intended to defer to state water law, California extensively quotes remarks addressing the bills that were before Congress from 1914 through 1917, H.R. 16673 (63d Cong.) and H.R. 408 (64th Cong.). Cal. Op. Br. 23-30. California does not tell us that these bills did not contemplate an exercise by Congress of its power under the commerce clause over jurisdictional waters of the United States nor provide for the licensing of projects on such waters.

Essentially, they provided:

> That the Secretary of the Interior be, and hereby is, authorized and empowered . . . to lease to citizens of the United States . . . *any part of the public lands of the United States* (including Alaska), reserved or unreserved, . . . for the purpose of constructing, maintaining, and operating dams [and other facilities] necessary or convenient to the development, generation, transmission, and utilization of hydroelectric power. . . .

See H.R. Rep. No. 16, 64th Cong., 1st Sess., 1-2 (1916) (emphasis supplied).

Thus, all of the remarks quoted on pages 23-30 of California's brief were directed at bills that proposed only to lease federal lands for water power development.

In December 1917, President Wilson asked the House to appoint a special committee to consider a bill for the comprehensive development of water power not only on lands but also in waters under the jurisdiction of the United States, which he had asked the Secretaries of War, Interior and Agriculture to draft. The Secretaries' bill, which provided for the development of water power on the lands and waters of the United States, was the prototype of the bill enacted in 1920. *See* H.R. Rep. No. 715, 65th Cong., 2d Sess., 13-15 (1918). It is noteworthy that the tenor of congressional remarks after 1917 quoted by California (Cal. Op. Br. 30-32) is generally quite different from that of the remarks quoted by California directed at the earlier bills and that some of the later remarks, *e.g.*, those of Congressman Myers, *id.* 34, show that the speaker was misinformed as to the content of the bill then before the Congress.

The "long and colorful legislative history" of the FPA was comprehensively presented and thoroughly considered in *First Iowa*, 328 U.S. at 171, and California's dissatisfaction with the Court's reading of it almost fifty years later hardly provides an adequate basis for review. *Cf. Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 419-22 (1986).

B.

California's contention that the Court's construction of § 27 in *First Iowa* is dictum is difficult to credit.

The project the Commission there had found best adapted to the development of the waterway, and wanted to license, called for an eight mile diversion of virtually the entire flow of the Cedar River to a power plant on the Mississippi River and its subsequent disgorgement into that river. A statute of Iowa forbad the issuance of any permit for a project by state authority unless "any water taken from the stream in connection with the project is returned thereto at the nearest practical place." 328 U.S. at 165-66. The state asserted that under its law the project could not be constructed. *Id.* at 170-71. As there can be no question that the state statute related "to the control, appropriation, use or distribution of water," within the terms of § 27 broadly construed, the question was squarely presented whether § 27 precluded the grant of a license by the Commission. The Court's conclusion that it did not was not dictum, it was the heart of the case.

C.

California's plea, that affirmance of the principle—that the Commission's jurisdiction to license hydro-

lectric projects on the lands and waters of the United States is exclusive of any overlapping or concurrent jurisdiction in state agencies—will complicate the management of water resources, is apocryphal.

One reading California's brief, who did not know better, would suppose that FERC's assertion that it has exclusive authority to prescribe the conditions of operation of a project licensed under the FPA, is something new and previously unheard of. In truth, of course, the principle has been at the core of our national water development policy at least since *First Iowa* and has been repeatedly confirmed by an unbroken line of authority. *See Town of Springfield v. McCarren*, 549 F. Supp. 1134, 1154 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983), *cert. denied*, 464 U.S. 942 (1983).

Part I of the FPA, as construed and applied in *First Iowa*, has served well for many years and has caused no particular difficulties for state agencies charged with the administration of local water laws. Beyond glittering generalities, liberally laced with sequins of chauvinism, California does not tell us what problems the existence of the Commission's longstanding jurisdiction has created.

It is nonsense to suggest that, in the absence of the Commission's jurisdiction, the nation's streams would be amenable to management by state agencies under unitary regimes. The law of our rivers invariably involves a complex of federal and state and, sometimes, international jurisdictions. The regulation of waters for the purposes of interstate and foreign commerce and for uses on federal reservations is the function and responsibility of the United States. In the case of reclamation and other water projects spe-

cifically authorized by Congress, state water laws apply only to the extent provided by Congress, which, as in the case of the Boulder Canyon Project, may be not at all. *California v. United States*, 438 U.S. at 674. Section 8 of the Reclamation Act itself displaces state law in so far as state law would permit water rights appurtenant to project lands to be separated therefrom and § 5 displaces state law insofar as state law would permit ownership of project lands in excess of the congressionally prescribed limits. *Id.* at 668, n. 21. Treaties and compacts further restrict the authority of states over waters within their boundaries, as do a number of federal acts for the protection of natural resources and the environment, the Clean Water Act being one of many examples of the latter.

Far from simplifying the management of water rights, the vestment of concurrent jurisdiction in the states over matters currently within the exclusive jurisdiction of FERC would result not only in confusion confounded but would undo the very thing Congress strove so hard to do in adopting the FPA seventy years ago: lodge the authority to secure the development of the water power potential of the lands and waters of the United States under its control in a single federal agency.

D.

California's proposition that the by-pass flows ordered by its water resources control board, being substantially greater than those ordered by FERC, are not incompatible with the license for the project (because the greater includes the lesser and maintenance of the greater by-pass flows ordered by the board

would satisfy the Commission's prescription of lesser flows) disingenuously ignores the fact that every cubic foot of water shunted from the turbines reduces the energy output of the project, on which its viability depends.

Determining the suitability and feasibility of projects and prescribing their modes of operation are matters Congress has committed squarely to the exclusive authority of FERC. As the quantity of water available to drive the turbines is critical to the feasibility and economics of a hydroelectric project, FERC cannot perform the responsibilities assigned it by Congress unless it can regulate flows through the power house without being overridden by state agencies.

IV. While Thoroughly Reviewing and Extensively Revising the FPA, Congress Recently Reconfirmed the Exclusiveness of the Commission's Jurisdiction

In 1986, incident to adopting the Electric Consumers Protection Act (ECPA), Pub. L. 99-495, 100 Stat. 1243, Congress revisited and extensively revised the FPA for the purpose, among others, of requiring the Commission in licensing projects to give equal consideration to the protection and enhancement of fish and wildlife and other natural resources as to the development of water power. Although Congress mandated that the Commission thoroughly consider the views and recommendations of state and federal fish and wildlife agencies, among others, in determining provisions to be made for the protection and enhancement of such resources, it left no doubt that the Commission is to remain the final arbiter. *See* § 10(j) of the FPA (16 U.S.C. § 803(j)); H.R. Rep. No. 99-507 at 22 (1986) (1986 U.S. Code, Cong. & Adm. News at 2509); H.R. Conf. Rep. No. 99-934 at 23

(1986) (1986 U.S. Code, Cong. & Adm. News at 2540). *See also Square D Co. v. Niagara Frontier Tariff Bureau, supra.*

Typically, several agencies of a state are authorized to permit various activities that, broadly speaking, relate "to the control, appropriation, use, or distribution of water." The constituencies of many of these agencies are hostile to any further development of streams for the generation of electric energy. Without risk of overstatement, it can be said that, as the experience of Klamath Falls demonstrates, there will be few hydroelectric projects built if these agencies are recognized as possessing jurisdiction "concurrent" with that of FERC to approve or disapprove their development. And it needs be stressed that, if California's claim of entitlement to set conditions of operation at variance with those prescribed by FERC were sustained, the power would extend not only to proposed but to all existing projects as well. After considering the matter of the allocation of authority in connection with the formulation of ECPA, Congress concluded it was imperative to leave exclusive authority with FERC to decide finally whether a project should be permitted and, if so, on what terms and conditions.

After all, the FPA provides for the development of lands and waters under the jurisdiction of the United States, of national rather than state resources. As the Court concluded in *First Iowa*:

> The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.

> It is the Federal Power Commission rather than [state agencies] that under our constitutional Government must pass upon these issues on behalf of the people of [the state] as well as on behalf of all others.

328 U.S. at 182.

CONCLUSION

It is respectfully submitted that the judgment of the court below must be affirmed.

Respectfully submitted,

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